LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 194

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,
Petitioners,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Leonard B. Boudin
Victor Rabinowitz
30 East 42nd Street
New York, N. Y.

David Rein
711 14th Street, N.W.
Washington, D.C.

Attorneys for Petitioners

Washington, D. C. - THIEL PRESS - 202 - 393-0625

INDEX

Opinion Below 1
Jurisdiction 2
Questions Presented 2
Statutes, Executive Orders and Regulations Involved 3
Statement of the Case 3
Reasons for Granting the Writ 5
Conclusion 10

CASES CITED

Association of Lithuanian Workers v. Brownell, 247 F.2d 64, vacated as moot, 355 U.S. 23 ..... 7, 12
Barsky v. Board of Regents, 347 U.S. 442 6
Cole v. Young, 226 F.2d 337 8
Cole v. Young, 351 U.S. 536 8
Dombrowski v. Pfister, 380 U.S. 479 8
Gilmore v. James, 274 F. Supp. 75, aff'd sub nom. James v. Gilmore, 389 U.S. 572 6
Industrial Workers of the World v. Clark, 385 F.2d 687 7
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 ..... 5, 7
Leedom v. Kyne, 358 U.S. 184 8
McCulloch v. Marineros de Honduras, 372 U.S. 10 7
McKart v. United States, No. 403, Oct. Term, 1968, decided May 26, 1969, 37 U.S. Law Week 4449 8
Montana-Dakota Util. Co. v. Northwestern P.S. Co., 341 U.S. 246 9
National Council v. Brownell, 243 F.2d 222 7
National Lawyers Guild v. Brownell, 225 F.2d 552 7
Public Utilities Comm. v. United States, 355 U.S. 534 ..... 8, 9
Schneider v. Roland, 263 F. Supp. 496, rev'd sub nom. Schneider v. Smith, 390 U.S. 17 6

Soltar v. Postmaster General of the United States, 277 F. Supp. 579 6
Staub v. Baxley, 355 U.S. 313 8
United Steelworkers of America v. Bagwell, 383 F.2d 492 6
Veterans of the Abraham Lincoln Brigade v. S.A.C.B., 380 U.S. 513 4
Waite v. Macy, 246 U.S. 606 9
Wills v. United States, 384 F.2d 943 8
Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 9

STATUTES

28 U.S. Code § 1254(1) 2
50 U.S. Code §§ 781 et seq. 3

EXECUTIVE ORDERS, AND REGULATIONS

Executive Order 9835 ..... 2, 3, 4
Executive Order 10450 ..... 2, 3, 4
28 C.F.R. Part 41 ..... 3, 4

TEXTS AND ARTICLES

Chafee, The Blessings of Liberty 6
Jackson, The Supreme Court in the American System of Government 6
Note, The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives," 67 Col. L. Rev. 1490 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,
Petitioners,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit remanding the cause in accordance with the Court's opinion dated February 14, 1969.

OPINION BELOW

The District Court issued no opinion. The opinion of the Court of Appeals has not as yet been reported and is appended hereto as Appendix A. The judgment is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1969. A timely petition for rehearing was denied on March 14, 1969. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of Executive Orders 9835 and 10450 authorizing the Attorney General to designate organizations as totalitarian, fascist, Communist, subversive, etc., are unconstitutional on their face.

2. Whether the Attorney General's designations of organizations pursuant to said Executive Orders violate the First, Fifth and Tenth Amendments to the Constitution, and constitute bills of attainder.

3. Whether an organization which the Attorney General has designated as "subversive", or its members, can challenge the constitutional powers of the Attorney General to list organizations without first exhausting the administrative procedures set up by the Attorney General.

4. Whether a complaint challenging the Attorney General's power to list organizations as subversive which raises only constitutional questions is barred by laches when the complaint seeks only relief for the future and there is no prejudice to the government arising from any delay in filing the suit.

5. Whether any rational purpose is served by remanding the case to the Attorney General where

(1) The sole issue raised by the complaint is the lack of constitutional power of the Attorney General to act;

(2) There are neither regulations nor any guidance given in the court opinion as to the issues to be resolved by the remand or the procedure for resolving them.

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure, 18 F.R. 2619, 28 C.F.R. Part 41, are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

On or about March 21, 1947, the Attorney General of the United States issued, pursuant to Executive Order 9835, a list of organizations separately characterized as "totalitarian, fascist, Communist or subversive." Among the organizations listed as "Communist" were petitioner, the Veterans of the Abraham Lincoln Brigade (hereafter called the Veterans), and the Abraham Lincoln Brigade (hereafter called the Brigade). The designations were made without notice or hearing, and no provision existed for seeking administrative relief. (R. 3, 7-8).

The Veterans is an unincorporated association of those members of the Brigade who returned to the United States from Spain after fighting from 1936 to 1938 in the armed forces of the Republic of Spain in support of the constitutionally elected government against insurgent, fascist forces. The individual Petitioners served in the Brigade during the Spanish Civil War and are members of the Veterans. The purpose and activities of the Veterans were to foster and continue the friendships formed in Spain during this period, to provide rehabilitation and medical care for members of the Brigade, to assist them in obtaining employment, food and living facilities upon their return to the United States, and to publish a periodical devoted to their activities. (R. 2).

On April 22, 1953, the Attorney General petitioned the Subversive Activities Control Board for an order requiring the Veterans to register as a "Communist-front organization" under section 7 of the Subversive Activities Control Act, 50 U.S. Code §§ 781, et seq. (R. 3, 9).

A few days later, on or about April 27, 1953, the Attorney General reissued his list of disapproved organizations, but without separate characterizations, under Executive Order 10450, which superseded Executive Order 9835. The Brigade and the Veterans were continued on the list. (R. 3, 8).

The relisting was also unaccompanied by notice or hearing. (R. 3). However, at the time of the redesignation, the Attorney General issued regulations providing procedures for contesting the listing (R. 11). Under these regulations, an organization whose listing was carried over from the previous designation was allowed ten days from the effective date of Executive Order 10450 to file with the Attorney General a written notice that it contested the listing. See 28 C.F.R. § 41.1(a), App. C., p. 3. Failure to file such a notice of contest was declared by the regulations to be "an acquiescence in such designation."

The Brigade was not then in existence, having expired in 1938. (R. 2). The Veterans did not file a "notice of contest" within the ten-day period, but contested the proceedings instituted against it by the Attorney General before the Subversive Activities Control Board. (R. 3, 11). The Board issued a registration order, but after judicial review and a remand of the case (see *Veterans of the Abraham Lincoln Brigade v. SACB*, 380 U.S. 513), the registration order was vacated and the Attorney General's petition was dismissed by the Board on April 20, 1968, on joint motion of the Veterans and the Attorney General. (R. 3, 9).

On May 31, 1966, the Veterans requested the Attorney General to remove the names of the Veterans and the Brigade from the list of "subversive organizations." On July 6, 1966, the Attorney General denied the request. (R. 3, 4, 10).

Petitioners thereupon filed in the United States District Court for the District of Columbia a complaint for a declaratory judgment and an injunction, seeking removal of the Veterans and the Brigade from the Attorney General's list.

(R. 2-6). The complaint alleged that the listing was injuring the reputation, business and prestige of the Veterans and its ability to obtain and retain members and to fulfill its purposes. The complaint also alleged that the list was used by the Civil Service Commission, the Department of Defense, the Coast Guard, other federal agencies, State and local governments, and private concerns and individuals, as a basis for denying members of the Veterans and the Brigade various rights and benefits, such as employment, trade union membership, ability to rent halls and meeting places, etc. (R. 4, 5).

The parties filed cross-motions for summary judgment (R. 12, 15, 16) and the district court, without opinion, granted the respondents' motion for summary judgment and denied petitioners'. (R. 16).

The court below vacated the district court order and "remanded for hearing on certain phases of the case" "under the current regulations."

Petitioners filed a petition for rehearing urging the following considerations:

(1) Since the sole issue raised in the case was the constitutional power of the Attorney General to act, it was futile to remand the case to the Attorney General to request a ruling from him that his listing of organizations was beyond his power and unconstitutional.

(2) There are no "current regulations" covering the subject, and a remand would serve no purpose in the absence of a statement as to the issues to be resolved in a remand and the procedure for resolving them.

The petition for rehearing was denied without comment.

REASONS FOR GRANTING THE WRIT

1. The importance and substantial nature of the constitutional questions posed by the present case need no elaboration, since they were recognized by the various opinions in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S.

123. That decision did not reach, but cast a serious cloud on, the power of the Attorney General to list organizations as "subversive." The opinions of Justices Black and Douglas concluded that the Attorney General's list violated the First Amendment and was a bill of attainder (at 143, 177); This view was reiterated by Justices Black and Douglas in *Barsky v. Board of Regents,* 347 U.S. 442, 459.

In his posthumously published book, *The Supreme Court in the American System of Government,* Mr. Justice Jackson stated at (p. 25): "In 1951 the Court cast serious doubts upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's view it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position and good name."

Prof. Chafee has stated (*The Blessings of Liberty,* p. 27): "The list . . . has been widely employed by states and cities and even by private organizations as proof of disloyalty of teachers and employees. The radio industry has accepted it as a basis for canceling the contracts of its performers. The list has accordingly become a powerful weapon for injuring any group there named or any individual who belongs to such a group."

These observations are confirmed by the events discussed in such recent cases as *Gilmore v. James,* 274 F. Supp. 75, aff'd sub nom, *James v. Gilmore,* 389 U.S. 572 (applicants for University employment required to sign statements of non-membership in organizations on Attorney General's list); *United Steelworkers of America v. Bagwell,* 383 F.2d 492 (permit to distribute leaflets barred to members in listed organizations); *Schneider v. Roland,* 263 F. Supp. 496, rev'd sub nom, *Schneider v. Smith,* 390 U.S. 17 (list used in Coast Guard screening of applicant for merchant marine employment); *Soltar v. Postmaster General of the United States,* 277 F. Supp. 579 (applicant for post office employ-

ment required to answer whether ever member of organizations on list). And see Note, *The Bill of Attainder Clause and Legislative and Administrative Suppression of "Subversives,"* 67 Col. L. Rev. 1490, 1506-1508.

Thus notwithstanding its dubious constitutionality, the Attorney General's list continues to be used on a wide scale to defame organizations and to discourage exercise of the right of association.

2. Since the decision of the Court in *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* all efforts to challenge the validity of the Attorney General's list have been frustrated by perplexing procedural obstacles created by the United States Court of Appeals for the District of Columbia Circuit and by evasive actions by the Attorney General.

The Court of Appeals has barred listed organizations from challenging the constitutional power of the Attorney General on the ground of failure to exhaust administrative remedies. See *National Council v. Brownell,* 243 F.2d 222; *Association of Lithuanian Workers v. Brownell,* 247 F.2d 64, vacated as moot 355 U.S. 23; *National Lawyers Guild v. Brownell,* 225 F.2d 552; *Industrial Workers of the World v. Clark,* 385 F.2d 687.[1]

The doctrine of exhaustion of remedies might be applicable to bar a litigant from litigating in court evidentiary objections not raised in an available administrative proceeding. It does not, however, bar a challenge to constitutional power. Where the challenge is to the power of the agency to act at all, courts will not require exhaustion of administrative remedies, especially where there are present, as here, "public questions particularly high in the scale of our national interest" *McCulloch v. Marineros de Honduras,* 372 U.S. 10, 17. "Where the only question is whether it is

[1] In the *IWW* case, the Court of Appeals also applied a remarkable doctrine of laches, finding that the Attorney General would be prejudiced (concededly a necessary element in applying laches) if the I.W.W. obtained a ruling that the list was unconstitutional, because other listed organizations might seek the benefits of such a ruling.

constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." *Public Utilities Comm. v. United States,* 355 U.S. 534, 540. See also *Staub v. Baxley,* 355 U.S. 313, 319; *Leedom v. Kyne,* 358 U.S. 184; *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817.

This is especially true where, as here, the litigant is not seeking to enjoin prospective administrative action, but is seeking relief from final administrative action already taken against it. *McKart v. United States,* No. 403, Oct. Term, 1968, decided May 26, 1969, 37 U.S. Law Week 4449; *Cole v. Young,* 351 U.S. 536; *Wills v. United States,* 384 F.2d 943. The rationale for this principle was explicated as follows by the Court of Appeals for the District of Columbia in its decision in the *Cole* case, 226 F.2d 337 at 339: "It [the government] says Cole failed to exhaust his administrative remedy and so his action must fall. While Cole failed to pursue the administrative remedy offered him—he affirmatively rejected it—nevertheless the administrative process was exhausted and a final administrative determination was reached and rendered. This is the nub of the rule that the administrative remedy must be exhausted. We think the Government's point is not well taken."[2]

When it appeared that these procedural obstacles might not prevent adjudication of the constitutional validity of the list, the Attorney General has warded off challenges to his constitutional power by several acts of discretion. He abandoned his proposal to list the National Lawyers Guild, when its determination to litigate the matter to a conclusion became obvious. See the account in *Dombrowski v. Pfister,* 380 U.S. 479, 495, ftn. 12. He suddenly delisted, *ex parte,* two organizations, without any prior indication

[2]The District of Columbia Court of Appeals has never elucidated why its reasoning in the *Cole* case did not apply to efforts of litigants to challenge the Attorney General's list. It has simply ignored both the *Cole* principle and the case itself.

or administrative proceeding, after they filed a petition for certiorari in this Court challenging their listing, thus mooting the case. See *Association of Lithuanian Workers v. Brownell,* 355 U.S. 23. Since that time he has added no new organizations to the list, although it is apparent that there are now extant many new groups which are "subversive" by the standards reflected in the list. It is not an unfair inference that his forbearance has been at least in part due to his recognition that his authority to list is constitutionally dubious.

3. In the present case the Court of Appeals evaded consideration of the constitutional questions by remanding the case to the Attorney General. It is plain that the Attorney General neither can nor will declare that the Executive Orders authorizing him to list organizations are invalid because they conflict with the Constitution. Cf. *Waite v. Macy,* 246 U.S. 606; *Public Utilities Comm. v. United States, supra* at 539. A remand to the Attorney General to consider the constitutional questions, the only questions present in the instant case, serves no purpose other than to frustrate resolution of these issues. See *Montana-Dakota Util. Co. v. Northwestern P. S. Co.,* 341 U.S. 246, 254.[3]

Nor can the remand serve any other legitimate purpose. The remand was ordered, according to the majority of the court below, because "the abandonment by mutual agreement of the effort to achieve registration was a material development in the liability to listing under the Executive Order. It should be so treated under the current regulations." But there are no *current* regulations. The only regulations ever issued on the subject were issued on April 29, 1953,[4] and they have never been amended or changed. There is nothing in these regulations that either support or

[3]The Court there said: ". . . we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose."

[4]The regulations are reproduced in Appendix C.

justify a remand of the case, or give any guidance as to the nature of a remand proceeding. Further, neither the regulations, the Attorney General, the court below or this or any other court have ever defined the elements or factors that would subject an organization to "the liability to listing under the Executive Orders." Accordingly, a remand of the case without any statement of the issues to be resolved, or the procedure for resolving them can serve no useful purpose and would be a mere exercise in futility.

CONCLUSION

In view of the position taken by the Court of Appeals below in this and in other cases, it is improbable that that court will ever reach or consider the serious constitutional questions raised by the Attorney General's list. At the same time the list continues and will continue to serve as an oppressive weight on the freedom of association. There is no justification either in law or policy for the special procedural rules erected by the court below for the purpose of precluding judicial review of this long outstanding cancer on the Constitution. However, unless this Court reviews the validity of the list in the present case, it is likely that the list will remain immune from judicial review, as it has since 1947. Accordingly, certiorari should be granted.

Respectfully submitted,

Leonard B. Boudin
Victor Rabinowitz
30 East 42nd Street
New York, N.Y.

David Rein
711 14th Street, N.W.
Washington, D.C.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,549

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,
Appellants

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

Decided February 14, 1969

Mr. Leonard Boudin, with whom *Mr. David Rein* was on the brief, for appellants.

Mrs. Lee B. Anderson, Attorney, Department of Justice, with whom *Assistant Attorney General Yeagley* and *Mr. Kevin T. Maroney*, Attorney, Department of Justice, were on the brief, for appellees.

Before BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge*, and DANAHER,* *Circuit Judge*.

PRETTYMAN, *Senior Circuit Judge:* Appellants sought by court order to be removed from the Attorney General's list kept by him pursuant to Executive Order No. 10450. The District Court on cross-motions for summary judgment granted the appellees' motion and denied that of appellants. This appeal followed. We recently had a similar problem in

*Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

Industrial Workers of the World v. *Clark*.[1] There we remanded for hearing on certain phases of the case. We think the same reasoning applies here; we apply the same rule and will enter a similar order.

In the *IWW* opinion we pointed out that in *Joint Anti-Fascist Refugee Committee* v. *Brownell*[2] the court held an extended time to be due an organization which had timely made plain its opposition to being put on the Attorney General's list. The point is acutely applicable here. Records[3] show that the Veterans of the Abraham Lincoln Brigade struggled constantly and vigorously for years against classification as a Communist-front organization. That its efforts were cast in proceedings concerning registration under a statutory board rather than listing under an executive order seems signally unimportant in the present posture of the controversy. The questions were basically the same, the purposes were the same, and the effects were substantially the same. First Amendment rights were involved. Moreover it seems clear that the abandonment by mutual agreement of the effort to achieve registration was a material development in the liability to listing under the Executive Order. It should be so treated under the current regulations.

Order vacated and cause remanded.

---

[1] 128 U.S. App. D.C. 165, 385 F.2d 687 (1967), *cert. denied*, 390 U.S. 948 (1968).

[2] 94 U.S. App. D.C. 341, 215 F.2d 870 (1954).

[3] The Veterans first appeared before the Subversive Activities Control Board on November 16, 1953, to contest a registration petition by the Attorney General. *Attorney General* v. *Veterans of the Abraham Lincoln Brigade*, SACB, Docket 108-53, Dec. 21, 1965. The Veterans were continuously before the Board or the courts until April 20, 1966, when, on joint motion of the Veterans and the Attorney General, the petition was vacated. See *Veterans of the Abraham Lincoln Brigade* v. *S.A.C.B.*, 380 U.S. 513 (1965), *vacating* 117 U.S. App. D.C. 404, 331 F.2d 64 (1963).

DANAHER, *Circuit Judge*, dissenting: It is so that the parties by mutual agreement abandoned[1] a contest respecting the Attorney General's attempts to cause the registration of the Veterans before the Subversive Activities Control Board, pursuant to *Brigade Veterans* v. *SACB*, 380 U.S. 513 (1965). However, the registration which the Attorney General there sought pursuant to section 7 of the Subversive Activities Control Act of 1950 as amended, 64 STAT. 993, involved a quite different predicate from an issue as to the Attorney General's earlier listing under Executive Order No. 9835, or the re-listing under Executive Order No. 10450.[2]

The Veterans tell us on brief, page 12:

> So here, we do not argue that there was insufficient evidence to support the conclusion of the Attorney General in listing appellant organization. We argue instead that whatever the evidence may have been, the Attorney General had no power to list the organization and that his action in so doing violated the First, Fifth and Tenth Amendments and constituted a bill of attainder.

Again, on brief the Veterans submit:

> [T]he issue of evidence or witnesses is not in this case. Concededly, appellants may have lost their right to challenge the sufficiency of the evidence upon which the Attorney General's listing was originally based. But we do not contend here that the evidence was inadequate; nor do we request a hearing on the evidence. Our contention is that the Attorney General had no power to list the Veterans without regard to any evidence he may have had.

[1] The Veterans on brief here explain:

> It may be fairly inferred from this course of action that on the remand of the case the Attorney General dropped the matter because he did not feel that he had sufficient evidence to establish that the Veterans was a Communist-front organization within the meaning of the Subversive Activities Control Act.

[2] *Compare* Executive Order No. 10450, discussed in Joint Anti-Fascist Refugee Committee v. Brownell, 94 U.S.App.D.C. 341, 215 F.2d 870 (1954).

Starkly posed, the Veterans thus present a frontal attack upon the power of the Executive. So stated, it seems to me apparent that the majority opinion should not stand.

An administrative remedy for an attack upon the listing had been provided. The Veterans deliberately chose to bypass the administrative channels. They seek now, fifteen years later, to explain their failure to have sought relief in respect of the listing on the ground that they preferred to attack the harsher sanctions which might have been imposed if registration had been achieved under the Subversive Activities Control Act. Our majority is remanding this case for consideration of the appropriateness of a remedy which had never been requested by the Veterans and, indeed, apparently is not desired. They have not challenged the Attorney General's listing as arbitrary nor have they claimed that the evidence was insufficient to justify the listing. They say that the Attorney General acting pursuant to the President's orders never had power to list the organization in the first place. They even ask that we overrule *Industrial Workers of World* v. *Clark*.[3]

In that case I dissented with respect to the order of remand following the second holding. But I quite agreed with the first holding as to which we were unanimous. I pointed out then that the appellants had not pursued the steps available to them to contest their designation:

> No timely challenge was levied against the orders of the regulations issued pursuant thereto. No administrative relief was sought. No judicial relief was asked. My colleagues acknowledge, as they must, that the District Court did not abuse its discretion in rejecting the appellants' present attack upon designation following Executive Order 10450, National Council of American-Soviet F. v. Brownell, 100 U.S.App.D.C. 116, 243 F.2d 222 (1957).[4]

I would affirm the order of the District Court.

[3] 128 U.S.App.D.C. 165, 385 F.2d 687 (1967), *cert. denied*, 390 U.S. 948 (1968).

[4] *Id.* at 172, 385 F.2d at 694 (dissenting opinion).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Feb. 14, 1969]

No. 21,549 September Term, 1968.

Civil Action 429-67.

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,

Appellants,

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Prettyman, Senior Circuit Judge; and Danaher,* Circuit Judge.

JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the judgment of the District Court appealed from herein is set aside, and this case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herein this date. *See Industrial Workers of the World v. Clark*, 128 U.S.App.D.C.

*Circuit Judge Danaher became Senior Circuit Judge on January 28, 1969.

165, 385 F.2d 687 (1967), *cert. denied,* 390 U.S. 948 (1968).

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: February 14, 1969.

Opinion by Senior Circuit Judge Prettyman.
Separate dissenting opinion by Circuit Judge Danaher.

APPENDIX C

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

I. Section 3, Executive Order 9835, 12 F. R. 1935

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

II. Pertinent Provisions of Executive Order 10450, 18 F. R. 2489

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * *

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

* * *

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

* * *

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

III. Attorney General's Rules of Procedure for the Federal Employee Security Program—Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 C. F. R. Part 41

Section 41.1 *Notice to and by Organizations.* (a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to

Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the Federal Register, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the Federal Register, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the Federal Register.

(c) The notice of contest provided in this Part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

Section 41.2 *Statement and Interrogatories by Attorney General.* Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

Section 41.3 *Reply by Organization.* The organization, within sixty days following receipt of such statement and interrogatories may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

Section 41.4 *Request for Hearing.* Any organization filing a reply as provided in this Part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

Section 41.5 *Notice of Hearing.* Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

Section 41.6 *Default.* When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

Section 41.7 *Hearing Board or Officer.* For the purpose of conducting any hearing as provided in this Part the Attorney General shall assign such officer or board as he shall deem necessary.

Section 41.8 *Hearing.* (a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this Part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or

documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

Section 41.9 *Recording of Testimony.* The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

Section 41.10 *Determination.* Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

Section 41.11 *Previous Designations Not Affected.* The promulgation of the rules of procedure contained in this Part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall

continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 194

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court issued no opinion. The opinion of the court of appeals (Pet. App. 11–14) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969. A petition for rehearing was denied on March 14, 1969. The petition for writ of certiorari was filed on June 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was required to pass upon difficult constitutional questions when it ap-

355-937—69

peared that further proceedings might establish that petitioners were entitled to the relief they sought on non-constitutional grounds.

REGULATIONS AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of Executive Orders 9835 and 10450 and of the Attorney General's Rules of Procedure, 28 C.F.R. Part 41, are set forth in Appendix C to the Petition.

STATEMENT

Petitioners, the Veterans of the Abraham Lincoln Brigade ("Veterans") and three of its members, sought by an action for declaratory and injunctive relief in the United States District Court for the District of Columbia to have their organization's name removed from the Attorney General's list of organizations seeking to alter the form of the government of the United States by unconstitutional means. The organization was originally placed on that list pursuant to Executive Order 9835; notice of this designation was published in the Federal Register on October 21, 1948 (13 Fed. Reg. 6138). Subsequent to this Court's decision in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, Veterans was redesignated under Executive Order 10450; notice of this designation was published in the Federal Register of May 12, 1953 (18 Fed. Reg. 2741). Although the regulations governing designation provided that it could be contested within ten days of publication and the organization was at the time resisting an order that it register under the Subversive Activities Control Act, Pet. 3–4, Veterans never sought to contest this desig-

nation—as it had not the designation under E.O. 9835—until May 31, 1966. On that date, it formally requested the Attorney General to remove its name and the name of the Abraham Lincoln Brigade [1] from the E.O. 10450 list. That request was denied on July 6, 1966. The present suit was then filed.

On November 14, 1967, the district court entered a judgment granting a government motion for summary judgment and dismissing the complaint. Petitioners filed a notice of appeal, and then sought certiorari in advance of judgment in this Court, No. 1074, O.T., 1967, because of the pendency of the petition for a writ of certiorari in another case in which similar relief had been sought and denied in the same court. *Industrial Workers of the World* v. *Clark,* 385 F. 2d 687 (C.A.D.C.), No. 953, O.T., 1967. Certiorari was denied in *Industrial Workers,* 390 U.S. 948, and shortly thereafter in the present case, 390 U.S. 987.

In *Industrial Workers,* the court of appeals had upheld the district court's refusal to consider challenges to original designations under E.O. 9835 and E.O. 10450, in 1949 and 1953, respectively, on the grounds that the twelve years' delay in mounting those challenges constituted laches and that the failure to contest the designations when made constituted a failure to exhaust administrative remedies. It noted, however, that the Attorney General had provided informal procedures for delisting organizations when it appeared that circumstances had so changed that

[1] The Brigade is no longer in existence, having expired in 1938.

his original conclusion in listing them was no longer justified. The court noted a recent decision in which the Seventh Circuit had ruled that the government's evidence in a deportation case had been insufficient, in light of modern standards, to establish that the Industrial Workers of the World "was an organization advocating the alteration of the American government by unconstitutional means," 385 F. 2d at 690–691. In the light of these changed circumstances, and the "considerable development in public and judicial attitudes toward control of subversives" which had occurred since the listing, *id.* at 693, the court concluded in *Industrial Workers* that summary judgment in the government's favor had been improper on the issue whether the Attorney General had acted arbitrarily and capriciously in refusing to delist the organization; the case was therefore remanded to the district court for further proceedings. *Id.* at 693–694.

When the present case was heard in the court of appeals after this Court's denial of certiorari in advance of judgment, *supra,* the court found the same disposition appropriate here. The same inexcusable delay was found to have occurred between the original designations and the challenge to them, justifying refusal to consider that challenge. On the other hand, here, too, the organization had sought delisting under the Attorney General's informal procedures; delisting had been denied, and it was competent for the district court to determine whether that denial was arbitrary and capricious. And in the present case there were also new circumstances like those that the court of appeals in *Industrial Workers* considered

relevant to such a determination: the same "development in public and judicial attitudes toward control of subversives", *id.* at 693; the holding of this Court in *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board,* 380 U.S. 513, that an order to register made by the Subversive Activities Control Board required a reasonably current record, in view of an order's prospective effect, but that the record in that case was stale; and the subsequent agreement of the parties to abandon the effort to force registration. Accordingly, the court below remanded the case to the district court for further proceedings, holding that summary judgment on the delisting issue had been improper.

ARGUMENT

The court of appeals correctly concluded that this case was in all material respects identical to *Industrial Workers, supra.* Here, as there, petitioners have failed to show any reason why the Attorney General should now be put to the burden of proving that action taken by one of his predecessors sixteen years ago was correct, or why their failure to challenge that action for thirteen years should be excused. See also *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841; *Landell* v. *Northern Pac. Ry. Co.,* 122 F. Supp. 253 (D.D.C.), affirmed, 223 F. 2d 316 (C.A.D.C.), certiorari denied, 350 U.S. 844; *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552 (C.A.D.C.), certiorari denied, 351 U.S. 927. Here, as in *Industrial Workers,* the case has been remanded for the district court to consider whether the Attorney General's refusal to delist the organization upon its

application was arbitary or capricious in the light of the factors which the court of appeals considered cast doubt on the present sufficiency of the administrative record and raised a question of "changed circumstances." Thus, if the petitioners prevail in the proceedings that will follow, they will have the relief they are seeking in this court.[2]

Petitioners insist that the remand will be futile, because they raise no factual issues and seek a determination only of the constitutionality of the listing scheme. This Court has made clear, however, that courts "should not be forced to decide [such] constitutional questions in a vacuum." *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 312. Petitioners sought particular relief—"removal of the Veterans and the Brigade from the Attorney General's list," Pet. 4—and it was competent for the court to require consideration of all possible bases for that relief; it need not have decided the question only on the grounds that petitioners would have preferred. As no final judgment adverse to petitioners has been entered on their complaint, review on certiorari is plainly unwarranted at this time, as it was at the same stage in *Industrial Workers, supra.*[3]

[2] There is no certainty that the Attorney General will be called upon to reconsider his refusal to delist; petitioners' assumption that the case will be mechanically remanded to him is unjustified. Moreover it is clear, in context, that the court's reference to "the current regulations," Pet. App. 12, is meant to refer to the informal procedures for delisting.

[3] There have been no further proceedings to date in *Industrial Workers.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

JULY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 2 51969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 194

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,
Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONERS

Leonard B. Boudin
Victor Rabinowitz
David Rein
Attorneys for Petitioners

Washington, D. C. · THIEL PRESS · 202 · 393-0625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 194

VETERANS OF THE ABRAHAM LINCOLN BRIGADE, et al.,

Petitioners,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY FOR PETITIONERS

In our petition we pointed out (pp. 9-10), that the remand of this case to the Attorney General would serve no legitimate purpose because: (a) The Attorney General does not have the power to declare unconstitutional the Executive Order authorizing him to list organizations, and (b) In the absence of a statement of the issues to be resolved or the procedure for resolving them, the remand would at best be a mere exercise in futility.

The government responds (Opp. 6) that, nonetheless, the constitutional issues posed in our petition should not be

heard because it is conceivable that on remand the case may be decided favorably to petitioners and thus become moot. But in the absence of any guidance as to what the remand is about, we fail to see how this result can be achieved.[1] The government acknowledges that there are no regulations governing the remand, and suggests, instead, that the remand be governed by the Attorney General's "informal procedures for delisting" (Opp. p. 6, fn. 2). But the only procedure for delisting, formal or informal, is the dubious privilege petitioners have of writing to the Attorney General and requesting that he delist the organization. Petitioners' previous request that the Attorney General delist the organization was denied without comment (R. 3, 9). There is nothing in the government's opposition to indicate that another request will be treated any differently.

Of course, the Attorney General can moot the case by simply delisting the organization. If that is his intention, the appropriate procedure would be for him to take that action and then notify the Court. That is the procedure that was followed in *Association of Lithuanian Workers v. Brownell*, 355 U.S. 23. But, since it is plain from the opposition that the Attorney General has no intention of taking such action, the only purpose a remand could serve would be to delay consideration of the important issues presented in the petition.

Respectfully submitted,

LEONARD B. BOUDIN
VICTOR RABINOWITZ
DAVID REIN
Attorneys for Petitioners

---

[1] The government does not even agree that the case should be remanded to the Attorney General. It argues (fn. 2, p. 6) that all that the Court of Appeals decided is that the district court should decide whether or not the case should be remanded. The government fails to state, and petitioners are unaware of, the factors to be evaluated by the district court in making such determination.